

1 KATZMANN, *Chief Judge, dissenting*:

2 Article 46 of the Collective Bargaining Agreement between the NFL
3 Players Association (the “Association”) and the NFL Management Council
4 requires the Commissioner to provide a player with notice of the basis for any
5 disciplinary action and an opportunity to challenge the discipline in an appeal
6 hearing. When the Commissioner, acting in his capacity as an arbitrator, changes
7 the factual basis for the disciplinary action after the appeal hearing concludes, he
8 undermines the fair notice for which the Association bargained, deprives the
9 player of an opportunity to confront the case against him, and, it follows, exceeds
10 his limited authority under the CBA to decide “appeals” of disciplinary
11 decisions.

12 In its thorough and thoughtful opinion, the majority does not contest this
13 understanding of the CBA. Instead, it asserts that the Commissioner did not
14 change the factual basis for the discipline and, in effect, that any change was
15 harmless. I cannot agree.

16 Additionally, on a more fundamental level, I am troubled by the
17 Commissioner’s decision to uphold the unprecedented four-game suspension.
18 The Commissioner failed to even consider a highly relevant alternative penalty
19 and relied, instead, on an inapt analogy to the League’s steroid policy. This
20 deficiency, especially when viewed in combination with the shifting rationale for
21 Brady’s discipline, leaves me to conclude that the Commissioner’s decision
22 reflected “his own brand of industrial justice.” *United Steelworkers of Am. v. Enter.*
23 *Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

24 For these reasons, I respectfully dissent.

25 I.

26 Judicial review of an arbitration award can be boiled down to a two-step
27 process. Both inquiries follow from the fundamental premise that “arbitration is
28 a matter of contract.” *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363
29 U.S. 574, 582 (1960). In the first step, the reviewing court asks whether the

1 arbitrator acted within the scope of his authority under the relevant collective
 2 bargaining agreement. *See Local 1199, Drug, Hosp. & Health Care Emp. Union,*
 3 *RWDSU, AFL-CIO v. Brooks Drug Co.*, 956 F.2d 22, 25 (2d Cir. 1992). This ensures
 4 that a party is not forced “to submit to arbitration any dispute which he has not
 5 agreed so to submit.” *Warrior & Gulf Nav. Co.*, 363 U.S. at 582. If the arbitrator
 6 acted within the scope of his authority, then his decision is entitled to substantial
 7 deference. The award will be upheld so long as the reviewing court finds, at the
 8 second step, that the arbitral award “draws its essence from the agreement” and
 9 does not reflect “merely an example of the arbitrator’s own brand of justice.”
 10 *Brooks Drug Co.*, 956 F.2d at 25. This guarantees that the parties get what they
 11 bargained for, namely, the arbitrator’s construction of the CBA. *Enter. Wheel &*
 12 *Car Corp.*, 363 U.S. at 599. In my opinion, the Commissioner’s decision fails as to
 13 both steps.

14 II.

15 With regard to the first step, Article 46 of the CBA vests the Commissioner
 16 with exceptional discretion to impose discipline for “conduct detrimental,” but it
 17 checks that power by allowing the player to challenge that discipline through an
 18 “appeal.” Joint App. at 345-46. In deciding the appeal, the arbitrator may decide
 19 whether the misconduct charged actually occurred, whether it was actually
 20 “detrimental” to the League, and whether the penalty imposed is permissible
 21 under the CBA. But the arbitrator has no authority to base his decision on
 22 misconduct different from that originally charged. When he does so, the
 23 arbitrator goes beyond his limited authority, and the award should be vacated.

24 I would find that the Commissioner breached that limitation here. I
 25 believe there are significant differences between the limited findings in the Wells
 26 Report and the additional findings the Commissioner made for the first time in
 27 his final written decision. The letter announcing Brady’s discipline explained
 28 that his “actions as set forth in the [Wells Report] clearly constitute[d] conduct
 29 detrimental to the integrity of and public confidence in the game of professional
 30 football” and warranted a four-game suspension. Joint App. at 329-30. The

1 Wells Report, in turn, concluded that it was “more probable than not that Tom
 2 Brady . . . was at least generally aware of the inappropriate activities of [Jim]
 3 McNally and [John] Jastremski involving the release of air from Patriots game
 4 balls,” Joint App. at 97, and that it was “unlikely” that McNally and Jastremski
 5 deflated the balls without Brady’s “knowledge,” “approval,” “awareness,” and
 6 “consent,” Joint App. at 114. The Commissioner’s final written decision,
 7 however, went further. It found that Brady “knew about, approved of,
 8 consented to, *and provided inducements and rewards* in support of a scheme by
 9 which, with Mr. Jastremski’s support, Mr. McNally tampered with the game
 10 balls.” Special App. at 51 (emphasis added).

11 Regardless of whether the difference between the Wells Report and the
 12 Commissioner’s decision constitutes a “quantum leap,” Maj. Op. at 21, I am
 13 convinced that the change was material. The misconduct found in the Wells
 14 Report is indisputably less culpable than inducing and rewarding cheating
 15 through the payment of memorabilia, as was found in the Commissioner’s final
 16 decision.

17 The majority takes the view that the Wells Report’s conclusions clearly
 18 encompassed a finding that Brady induced and rewarded the deflation of
 19 footballs. To the contrary, although the Wells Report described evidence that
 20 Brady provided both McNally and Jastremski with gifts and that McNally joked
 21 about demanding cash and other memorabilia, it never concluded that it was
 22 “more probable than not” that the gifts Brady provided were intended as
 23 rewards or advance payment for deflating footballs in violation of League rules.
 24 That stands in stark contrast to the Wells Report’s clear conclusions, by a
 25 preponderance of the evidence, regarding Brady’s “knowledge,” “approval,”
 26 “awareness,” and “consent.” Fairly read, the Wells Report did not put Brady on
 27 notice that he was found to have engaged in a *quid pro quo*.¹

¹ The majority also suggests that the Association never raised this issue. Although not every detail I mention is found in the Association’s brief, the concern is not of my own making. See Br. for Appellees Nat’l Football League Players Ass’n and Tom Brady at 49 (“Hoping to compensate for the Wells Report’s limited findings concerning Brady’s state of mind, Goodell pulled his ‘participat[ion]’ and ‘inducement[.]’

1 I would also find that Brady was prejudiced by the change in the
 2 Commissioner's rationale and the resulting lack of notice. The Association, in
 3 light of the lack of any clear finding in the Wells Report as to the purpose of the
 4 gifts, paid almost no attention to Brady's gift-giving during the appeal hearing.
 5 To support Brady's argument that he had no relationship with McNally, counsel
 6 for the Association asked Brady on direct examination whether he ever provided
 7 gifts to people he did not know, and Brady's affirmative response was then used
 8 in his post-hearing brief only to establish that single point. *See* Dist. Ct. Dkt. No.
 9 28-231 at 15 (Post-Hearing Br. of the NFLPA and Tom Brady) ("The only thing
 10 'linking' [Brady and McNally] is that Brady purportedly signed memorabilia for
 11 McNally, but Brady testified that he naturally does not know the name of
 12 everyone for whom he signs memorabilia, and even Wells found that Brady
 13 never provided McNally any year-end gifts or bonuses that would suggest they
 14 had any relationship."). Beyond that, the gifts played no role in the Association's
 15 challenge to Brady's discipline: the League did not ask Brady about gifts to
 16 McNally on cross-examination, and neither side asked Brady about any gifts he
 17 provided to Jastremski.

18 The Association's silence on this issue, however, seems to me to reflect
 19 only the lack of notice, not the lack of an available argument or a tactical decision
 20 to focus on other issues. The Wells Report found that McNally referred to
 21 himself as "the deflator" and threatened (perhaps jokingly) to go to ESPN as far
 22 back as May 2014, but it also credited McNally's statement that Brady never
 23 provided him with the same gifts doled out to other employees in the locker
 24 room.² The suggestion that McNally did not receive gifts from Brady even

language from thin air."). Indeed, the majority addresses the Association's challenge to the Commissioner's shift to a finding of "participation," and in my view, the Commissioner's decision uses "participation" to refer to not only Brady's knowledge and approval of the scheme, but also his use of inducements and rewards. The Association's failure to fully flesh out this argument is, I suspect, a consequence of the district court never having reached the issue, *see Nat'l Football League Mgmt. Council v. Nat'l Football League Players Assn.*, 125 F. Supp. 3d 449, 474 (S.D.N.Y. 2015), and the majority's decision (with which I do not quarrel) to reject the Association's request to remand on this issue.

² For example, the Wells Report stated the following regarding texts from McNally demanding tickets to a game between the Boston Celtics and Los Angeles Lakers and new Uggs shoes:

1 during the period in which McNally sent suspicious text messages is further
 2 corroborated by an October 2014 text message in which Jastremski told McNally
 3 that Brady “gives u nothing.” Joint App. at 101. Finally, it appears undisputed
 4 in the Wells Report that Brady provided gifts to other locker room attendants
 5 who have not been implicated in the deflation (or any other) scheme. Brady’s
 6 gift-giving, in other words, was not necessarily indicative of illicit behavior.

7 None of this is to say that the inferences that the Commissioner drew from
 8 the evidence presented in the Wells Report constituted reversible error on their
 9 own. But the foregoing demonstrates that the Association would have been able
 10 to offer a meaningful challenge to the Commissioner’s conclusion (possibly
 11 supported by additional new evidence regarding Brady’s practice of providing
 12 gifts) had it been announced prior to the Article 46 appeal hearing. Taking the
 13 Commissioner at his word that he “entered into the appeal process open to
 14 reevaluating [his] assessment of Mr. Brady’s conduct and the associated
 15 discipline,” Special App. at 60, I believe that, had Brady been provided an
 16 opportunity to challenge the Commissioner’s conclusion on this score, the
 17 outcome may have been different. The majority’s observation that the
 18 Commissioner did not increase Brady’s punishment is beside the point. Had the
 19 Commissioner confined himself to the misconduct originally charged, he may
 20 have been persuaded to decrease the punishment initially handed down.

McNally described these texts as jokes, *which we think is likely the case*. Specifically, on December 5, 2014, the Boston Celtics were playing the Los Angeles Lakers in Boston and McNally had been asking Jastremski to get them tickets to a Celtics-Lakers game for years. McNally said the joke was that Brady should get them courtside seats for the game. With regard to the Uggs, McNally said that around the holidays each year Brady gives Uggs footwear to certain Patriots staff members, *but that McNally has never received them*. He explained that his message was a humorous response to a news report on Brady’s distribution of Uggs in 2014.

Joint App. at 183 (emphasis added).

1 Accordingly, I would find that the Commissioner exceeded his authority,
 2 to Brady's detriment, by resting Brady's discipline on factual findings not made
 3 in the Wells Report.³

4 III.

5 I would also find that the Commissioner's decision fails at the second step
 6 of our analysis because it does not draw its essence from the CBA. It must be
 7 emphasized that the case at hand involves an unprecedented punishment.
 8 Precisely because of the severity of the penalty, one would have expected the
 9 Commissioner to at least fully consider other alternative and collectively
 10 bargained-for penalties, even if he ultimately rejected them. Indeed, the CBA
 11 encourages—though, as the majority observes, does not strictly require—the
 12 Commissioner to fully explain his reasoning by mandating that he issue a
 13 written decision when resolving an Article 46 appeal. That process is all the
 14 more important when the disciplinary action is novel and the Commissioner's
 15 reasoning is, as here, far from obvious.

16 Yet, the Commissioner failed to even mention, let alone explain, a highly
 17 analogous penalty, an omission that underscores the peculiar nature of Brady's
 18 punishment. The League prohibits the use of stickum, a substance that enhances
 19 a player's grip. Under a collectively bargained-for Schedule of Fines, a violation
 20 of this prohibition warrants an \$8,268 fine in the absence of aggravating
 21 circumstances. Given that both the use of stickum and the deflation of footballs
 22 involve attempts at improving one's grip and evading the referees' enforcement

³ The Commissioner's rationale also shifted insofar as he relied on new evidence regarding Brady's destruction of his cell phone to find that Brady "willfully obstructed" Wells's investigation. Special App. at 54. The majority persuasively demonstrates, however, that Brady anticipated this change and challenged it at the hearing and in his post-hearing brief. Thus, I agree that the Commissioner's reliance on this new evidence does not provide a ground to vacate the suspension. *Cf. Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 390 (2d Cir. 2003) ("We will, of course, not vacate an arbitral award for an erroneous application of the law if a proper application of law would have yielded the same result.").

1 of the rules,⁴ this would seem a natural starting point for assessing Brady's
 2 penalty. Indeed, the League's justification for prohibiting stickum—that it
 3 “affects the integrity of the competition and can give a team an unfair
 4 advantage,” Joint App. at 384 (League Policies for Players)—is nearly identical to
 5 the Commissioner's explanation for what he found problematic about the
 6 deflation—that it “reflects an improper effort to secure a competitive advantage
 7 in, and threatens the integrity of, the game,” Special App. at 57.⁵

8 Notwithstanding these parallels, the Commissioner ignored the stickum
 9 penalty entirely. This oversight leaves a noticeable void in the Commissioner's
 10 decision,⁶ and in my opinion, the void is indicative of the award's overall failure
 11 to draw its essence from the CBA. Even taking into account the special
 12 circumstances here—that the alleged misconduct occurred during the AFC
 13 Championship Game, that team employees assisted in the deflation, that a
 14 deflated football arguably affects every play, and that Brady failed to cooperate
 15 in the subsequent investigation—I am unable to understand why the
 16 Commissioner thought the appropriate penalty was a four-game suspension and
 17 the attendant four-game loss of pay, which, in Brady's case, is far more than

⁴ Just as the referees check the inflation level of the footballs before the start of the game, they check players for stickum “prior to the game and prior to the beginning of the second half.” Joint App. at 384.

⁵ Although the Commissioner reasoned that steroid use also has the same adverse effects on the League, the fact that numerous infractions may be said to compromise the integrity of the game and reflect an attempt to gain a competitive advantage serves only to render more problematic the Commissioner's selection of what appears to be the harshest potential comparator without any meaningful explanation. This is especially true since, for the reasons stated by the district court, the Commissioner's analogy to steroid use is flawed. *See Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 465. In short, the Commissioner's reliance on the League's steroid policy seems to me to be nothing more than mere “noises of contract interpretation” to which we do not ordinarily defer. *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) (quoting *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 187 (7th Cir. 1985)).

⁶ The omission is all the more troubling since the Association raised this point during the arbitration proceedings. *See* Dist. Ct. Dkt. No. 28-231 at 9 (Post-Hearing Br. of the NFLPA and Tom Brady) (“The Player Policies further illustrate the disparate nature of any player suspension for an alleged competitive infraction, let alone for just being ‘generally aware’ of one. They identify player punishments for equipment violations that ‘affect[] the integrity of the competition and can give a team an unfair advantage’—such as putting stickum on receiver gloves . . . —and subject first-time player offenders to a fine of \$8,268 for a specified violation.”).

1 \$8,268. The lack of any meaningful explanation in the Commissioner's final
 2 written decision convinces me that the Commissioner was doling out his own
 3 brand of industrial justice. *Cf. Burns Int'l Sec. Servs., Inc. v. Int'l Union, United*
 4 *Plant Guard Workers of Am. (UPGWA) & Its Local 537*, 47 F.3d 14, 17 (2d Cir. 1995)
 5 ("[I]f a ground for the arbitrator's decision can be inferred from the facts of the
 6 case, the award should be confirmed." (quoting *Sobel v. Hertz, Warner & Co.*, 469
 7 F.2d 1211, 1216 (2d Cir. 1972)) (emphasis added). In this regard, it bears noting
 8 that the Schedule of Fines provides that a player caught violating the prohibition
 9 on stickum a second time is to be fined \$16,537. Thus, even where aggravating
 10 circumstances exist, the Schedule of Fines does not provide for the extreme
 11 increase in penalty that the Commissioner found appropriate here.⁷

12 In sum, the Commissioner's failure to discuss the penalty for violations of
 13 the prohibition on stickum, the Commissioner's strained reliance on the penalty
 14 for violations of the League's steroid policy, and the Commissioner's shifting
 15 rationale for Brady's discipline, together, leave me with the firm conviction that
 16 his decision in the arbitration appeal was based not on his interpretation of the
 17 CBA, but on "his own brand of industrial justice." *Enter. Wheel & Car Corp.*, 363
 18 U.S. at 597.

19 IV.

20 The Commissioner's authority is, as the majority emphasizes, broad. But it
 21 is not limitless, and its boundaries are defined by the CBA. Here, the CBA grants
 22 the Commissioner in his capacity as arbitrator only the authority to decide

⁷ The majority again gives me too much credit in stating that the Association did not raise this argument. I read the Association's brief to make two arguments with respect to alternative penalties. The first is that the Player Policies, and in particular the "Other Uniform/Equipment Violations" provision, governed Brady's misconduct here and necessitates that he receive no more than a fine. I agree with the majority that this has no merit. The second, however, is that the Commissioner's failure to discuss certain probative terms—in particular, the "Other Uniform/Equipment Violations" provision and the stickum prohibition (obviously, I find only the latter actually probative)—reflects that the Commissioner was not actually construing the CBA, the only limitation imposed on an arbitrator acting within the scope of his authority. And, as the majority acknowledges, in support of that argument, the Association contends that the Commissioner's "CBA defiance is only underscored by his reliance on the Steroid Policy." Br. for Appellees Nat'l Football League Players Ass'n and Tom Brady at 45.

1 “appeals,” that is, whether the initial disciplinary decision was erroneous. The
2 Commissioner exceeded that limited authority when he decided instead that
3 Brady could be suspended for four games based on misconduct found for the
4 first time in the Commissioner’s decision. This breach of the limits on the
5 Commissioner’s authority is exacerbated by the unprecedented and virtually
6 unexplained nature of the penalty imposed. Confirming the arbitral award
7 under such circumstances neither enforces the intent of the parties nor furthers
8 the “federal policy that federal courts should enforce [arbitration] agreements . . .
9 and that industrial peace can be best obtained only in that way.” *Textile Workers*
10 *Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957).

11 I end where I began. The Article 46 appeals process is designed to provide
12 a check against the Commissioner’s otherwise unfettered authority to impose
13 discipline for “conduct detrimental.” But the Commissioner’s murky
14 explanation of Brady’s discipline undercuts the protections for which the NFLPA
15 bargained on Brady’s, and others’, behalf. It is ironic that a process designed to
16 ensure fairness to all players has been used unfairly against one player.

17 I respectfully dissent.